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Supreme Court of the United States

OCTOBER TERM 1943

No. 848

LYNBROOK GARDENS, INCORPORATED,

Petitioner,

against

BERNARD C. ULLMANN,

Respondent.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Statement

The petition for a writ of certiorari herein seeks review of a final judgment of the New York Court of Appeals in *Lynbrook Gardens, Incorporated* v. *Ullmann,* 291 N. Y. 472 (1943), which judgment reversed the lower courts and dismissed the complaint in an action for specific performance of contracts for the sale of land. The respondent contended that Article VII-A of Title 3 of the Tax Law of the State of New York (Laws of New York 1939 Ch. 692) under which title to said land was derived was unconstitutional.

ARGUMENT

The Supreme Court of the United States is without jurisdiction to grant a writ of certiorari herein.

The Court of Appeals of the State of New York did not actually decide any Federal question and the deciding of a Federal question was not a pre-requisite to the judgment as rendered.

The Court of Appeals in its majority opinion stated (R. 218):

> "In this case, however, the Courts of this State cannot authoritatively determine the questions of law which create serious doubt as to the validity of the Statute by virtue of which the seller has acquired title and no decree of specific performance can give to the buyer assurance that the title transferred to him will not be successfully challenged thereafter. The question of the validity of the Statute has been challenged on substantial grounds. This Court can authoritatively determine whether or not the Statute violates the provisions of the Constitution of the State of New York; only the Supreme Court of the United States can ultimately determine whether the Statute violates the Provisions of the Constitution of the United States. Even though this Court were to sustain the validity of the Statute, the Supreme Court of the United States might still reach a different conclusion. * * *
>
> A title which can be challenged in that manner is not marketable and a decree of specific performance may not be returned under such circumstances."

From the foregoing it is evident that the Court of Appeals not only did not decide the constitutionality of the Statute under the Constitution of the United States, but as a pre-requisite to the rendering of its decision did not deem it necessary to decide its constitutionality under the Constitution of the State of New York.

Further evidence of the fact that the Court of Appeals did not decide the question of the constitutionality of this Statute under the Constitution of the United States is found in its dissenting opinion in which it states (R. 222):

> "It would not do under these circumstances for a single Judge of this Court to state his views as to that question of constitutionality, so I content myself with dissenting on the ground that this Court should determine the question in this case."

The only defense affirmatively presented by the respondent in the Court of Appeals was the contention that Article VII-A of Title 3 of the Tax Law of the State of New York, under which title to the lands in question had been derived, was repugnant to the Provisions of Section 1 and 6 of Article I of the Constitution of the State of New York and Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that said Statute attempts to deprive persons of their property without due process of law. The Court of Appeals did not decide the constitutionality of this Statute, but rather based its judgment upon the theory that a question of its constitutionality might exist under the Constitution of the United States and that, while such question existed, the title derived under such Statute was not marketable and consequently a decree of specific performance could not be rendered.

To secure a review by the United States Supreme Court of a decision of a state court on certiorari the necessary pre-requisite is exemplification of a Federal question, that was affirmatively presented, that its decision was necessary to the determination of the cause and that it was actually decided or that judgment as rendered could not have been found without deciding it. (*Honeyman* v. *Hanan,* 300 U. S. 14, 21; *Southwestern Bell Telephone Co.* v. *State of Oklahoma,* 303 U. S. 206, 212 and 213; *Scott* v. *Platt,* 137 P. (2) 975; *Williams* v. *Keyes,* 186 S. 250; Judicial Code Section 237, 28 U. S. C. A. 344.)

The Supreme Court of the United States may examine the opinion of State Courts to ascertain whether a Federal question was raised and decided (*State of Indiana, ex rel Anderson* v. *Brand,* 303 U. S. 95).

The respondent contends that the Court of Appeals of the State of New York not only did not decide the constitutionality of the Statute, but by its decision herein has found that a decision upon the constitutionality of Article VII-A of Title 3 of the Tax Law of the State of New York was not necessary to a determination of the cause (R. 216-222). Such decision does not constitute sufficient basis to confer upon the Supreme Court of the United States jurisdiction to grant a writ of certiorari (*State of Minnesota* v. *National Tea Co.,* 309 U. S. 551, 555).

CONCLUSION

Certiorari should be denied.

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